United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by:
George H. Lowe
Estimated Time: 20 Minutes

Docket No. 75-1428

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P/S

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— *vs.* —

VITO M. PASTORE,

Appellant.

On Appeal from the United States District Court,
Northern District of New York

BRIEF FOR APPELLEE,
United States of America

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Docket No. 75-1428

UNITED STATES OF AMERICA,

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vs.

VITO M. PASTORE,

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BRIEF FOR APPELLEE,
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STATEMENT OF ISSUES

1. Whether the trial court erred in receiving in evidence handwriting exemplars prepared during the trial by the witnesses Cedrone and Galoni.

2. Whether the trial court erred in permitting the witness Cedrone to testify that the defendant was the recipient of Ron-Ore checks.

3. Whether the trial court erred in permitting Cedrone to testify that

the letters "R", "O", and "N" represented Cedrone and the letters "O", "R", and "E" represented Pastore.

4. Whether the Government's summation deprived the defendant of a fair trial.

5. Whether the supplemental charge to the jury was proper.

6. Whether that portion of the sentence imposed upon defendant requiring him to resign as a member of the Bar of the State of New York was lawful.

STATEMENT OF THE CASE

On May 8, 1974, a one count indictment was filed with the United States District Court for the Northern District of New York charging the defendant with wilfully and knowingly making and subscribing an income tax return for the year 1971, which return was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, and which return the defendant did not believe to be true and correct as to every material matter, in violation of Title 26, United States Code, Section 7206(1). (A 5 of Appendix).[1/]

On September 17, 1975, trial commenced before Judge Lloyd F. MacMahon,

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1/ The appendix referred to is that of the defendant; the page references are to the original record transcript pages, except where, as here, the phrase "of Appendix" appears.

sitting by designation, and a jury. (1). On September 20, 1975, the jury returned a verdict of guilty. (426).

On November 20, 1975, the defendant was sentenced, pursuant to Title 18, United States Code, Section 3651, to two years' imprisonment, six months of which were to be served in a jail-type institution. Execution of the remaining eighteen months of the sentence was suspended. At the expiration of the period of confinement in a jail-type institution the defendant is to be placed on probation for the remainder of the sentence, with a special condition of the probation being that the defendant, an attorney, resign as a member of the Bar of the State of New York. (A 40 of Appendix). Execution of the sentence was stayed pending this appeal.

STATEMENT OF FACTS

The defendant, Vito M. Pastore, graduated from the Syracuse University School of Law in 1962, and was admitted to practice law in the State of New York in 1963. (41-42). For a period of time prior thereto he had served as a federal bank examiner. (41). He commenced practicing law in Auburn, New York, County of Cayuga, and for a period of time served as an Assistant District Attorney for the County. (41, 44).

In 1968 the defendant was the Town Attorney for the Town of Fleming, a community immediately adjacent to Auburn. (45, 43). During that year the Town initiated planning for the installation of a sewer system for part of the Town. (45 - 46). After 1968 the defendant no longer served as Town Attorney; in 1969 the position was not filled, while in 1970 and 1971 another attorney, Louis Contiguglia, was retained. (45). Nevertheless, the defendant, through at least 1971, continued to represent the Town in connection with the sewer project. (45).

In or about July of 1970 the defendant contacted Frank Cedrone, a pipeline contractor from Fulton, New York, and asked him to come to Auburn to discuss a sewer job. (182). Cedrone subsequently did so, and was informed about the Fleming sewer project. (183). He was advised that the low bid initially received for the construction of the sewer project was around two million dollars, and was asked if the job could be done for under a million and a half. (183). Cedrone had never undertaken a construction job as substantial as the Fleming sewer project, and at this time he

was in serious financial difficulty. (184)

Cedrone subsequently asked Kenneth Marshall, a land developer from Oswego, New York, whether he would be interested in bidding on the job. (185). A successful bid then was placed by Marshall, d/b/a J & K Pipe Company, in the amount of between 1.4 and 1.5 million dollars. (186, 46).

Shortly thereafter the name of Marshal's business was changed to Ron-Ore Soil Systems, which in December of 1970 was incorporated under the name of Ron-Ore Soil Systems, Ltd. (hereinafter "Ron-Ore"). (47, 150). The legal work associated with the incorporation of Ron-Ore was accomplished by John Pettigrass, an Auburn attorney who shared office space with the defendant. (150, 144-145). Pettigrass was asked to perform this legal service by Cedrone, to whom he was introduced by the defendant. (152). Initially Cedrone was Project Manager for Ron-Ore on the Fleming sewer project; as of July, 1971, he became President of Ron-Ore. (180). At this time the defendant accompanied Cedrone to a bank to assist him in the opening of a new Ron-Ore account. (192). Ron-Ore's monthly bank statements and cancelled checks were sent to the building in which the defendant's law office was located. (Exhibit 34). At trial when asked about the name "Ron-Ore", Cedrone testified that the letters "R", "O", and "N" represented Cedrone, whereas the letters "O", "R", and "E" represented Pastore. (181, 304-305, 331-332).

One of the requirements pursuant to which the sewer project was put up for bid was that the successful bidder post both a performance bond and a labor and materials bond within either 30 or 45 days of the

opening of bids. (241). When the deadline for the posting of the bonds was close at hand, the defendant produced for Contiguglia copies of appropriate bonds purportedly issued by the Trans-American Insurance Company. (243-244). Quite some time later the Town learned that the bonds were fraudulent, since the signatures of the issuing officer had been forged. (252).

In September of 1970, Frank Cedrone and Frank's brother, Lenny, (who subsequently died), drove to Skaneateles, New York, a community close to Auburn, and there met with the defendant in the latter's car. (187). Lenny stated to the defendant that Kenneth Marshall would pay $75,000 if the sewer project could be accomplished without a bond. The defendant responded that he would take it under advisement. (188).

At trial it was stipulated to that the defendant during 1971 had received income totalling $6,868.43 for certain services performed by him (unrelated to Ron-Ore and the Town of Fleming) and as bank interest. (80-81). In addition the Government established that between January and May, 1971, the defendant received $31,040 as proceeds from eleven checks. Nine of these checks were drawn on Ron-Ore's account, while the other two were bank treasurer's checks purchased with Ron-Ore funds. Seven of these checks were endorsed "Nick Galloni", and were payable to "Nick Galloni" or "cash". At trial Galoni, whose name is correctly spelled with only one "ℓ", denied endorsing these checks, obtaining any of the proceeds, or having any knowledge pertaining to their issuance

or negotiation. (209, 229, 210-212).[2/] Three of the remining checks were payable to apparently fictitious payees, while the fourth check was payable to a person who testified that he had no knowledge of the check nor had he obtained any of the proceeds. (287-290, 312-314, 166).

The last specific item of income attributed to the defendant by the Government was $4,062, the net cost of a 1971 Cadillac which the defendant purchased in March of 1971 with a check drawn on the Ron-Ore account. (126-131).

The Government contended that the aforementioned monies were obtained by the defendant from Ron-Ore for the services he performed on its behalf, and therefore constituted income to him. Thus the defendant's gross income for 1971 was at least $41,970.43, as opposed to the gross income of $18,918 that he reported on his income tax return for that year. (Exhibit 1).

The defendant did not testify at trial but called as witnesses two Syracuse attorneys, who testified that on five occasions during 1971 the defendant, as Frank Cedrone's attorney, had settled claims against Cedrone or his corporations in the total amount of $5,500. The witnesses testified that the defendant paid these claims with cash. One of these

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2/ Both Galoni and Cedrone testified for the Government at trial. Cedrone previously had pleaded guilty to filing a false income tax return for the year 1972; remaining counts in that indictment subsequently were dismissed as against him and his wife. A one count indictment charging Galoni with filing a false return for the year 1971 was dismissed prior to his testifying. Both Cedrone and Galoni testified pursuant to immunity grants; this was required in light of local indictments pending against them, as well as against the defendant and others, based on matters related to the Fleming sewer project.

payments was made in June, 1971, two in July, 1971, and two in September, 1971. (336-340). The disputed specific items of income charged to the defendant by the Government were payments made to him between January and May.

ARGUMENT

POINT I

IT WAS NOT ERROR FOR THE TRIAL COURT TO RECEIVE IN EVIDENCE HANDWRITING EXEMPLARS PREPARED DURING THE TRIAL BY THE WITNESSES CEDRONE AND GALONI

During the course of the trial, and outside the presence of the court and jury, the witnesses Cedrone and Galoni prepared certain handwriting exemplars for examination by the Government's expert. (220, 234). The witness Galoni provided ten specimens of his handwriting in the name "Nick Galoni", spelled with one "ℓ", and an additional ten specimens of his handwriting in the name "Nick Galloni", spelled with two "ℓ"s.[3/] (Exhibits 24 and 25). The witness Cedrone provided twelve specimens of his handwriting, six in his own name, two in the name of "Irv Furletti", two in the name of "Nick Galoni" spelled with one "ℓ", and two in the name

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3/. All of the disputed "Nick Galloni" signatures contained two "ℓ"s, whereas the correct spelling of Galoni's name was with just one "ℓ". (209).

of "Nick Galloni" spelled with two "ℓ"s. (Exhibits 27 - 31).

At trial the expert, whose qualifications were stipulated to by defense counsel (122, 231), testified that he had compared the witness Galoni's exemplars to the handwritten endorsements "Nick Galloni" appearing on the reverse sides of four of the disputed checks containing such an endorsement. The expert further testified that he had compared the witness Cedrone's exemplars to the endorsements appearing on the same four checks and to the endorsement on a check payable to "Irv Furletti". Over defense counsel's objection, the expert was permitted to testify that, based upon his examination, the persons making the exemplars had not made the endorsements on the reverse sides of the exhibits.[4/] (231-236).

The basis for defense counsel's objection at trial, as well as on appeal, was this Court's decision in United States v. Lam Muk Chiu, 522 F.2d 330, 331 (2nd Cir. 1975).[5/] There the trial court had refused the defendant's

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4/. The expert previously had been called as a Government witness to testify concerning his comparison of the defendant's known handwriting with an endorsement in the defendant's name appearing on one of the checks in issue. (121-125).

5/. Defense counsel alertly recalled the essence of the Lam Muk Chiu decision, which had been handed down only a month before the trial, but could not recall the name of the case nor, during a trial recess and during the evening following the expert's testimony, could he locate the slip opinion. A review of recent slip opinions by the prosecutor was similarly unsuccessful. (232-233, 265).

offer into evidence of three proffered samples of his handwriting, which samples had been prepared for use at trial. This Court approved that ruling.

The Government has no quarrel with the decision reached in Lam Muk Chiu, which supports the basic proposition that whether a writing has been authenticated, for use as a basis of comparison, is a matter for the trial court to determine, and in order to secure a reversal on appeal the defendant has the burden of showing that the ruling was not fairly supported by the evidence. United States v. Swan, 396 F.2d 883 (2nd Cir. 1968), cert. den. 89 S.Ct. 254 (1968). See also United States v. Reed, 439 F.2d 1(2nd Cir. 1971); United States v. American Radiator & Stand. San. Corp., 433 F.2d 174, 192-193 (3rd Cir. 1970), cert. den. 401 U.S. 948 (1971); United States v. White, 444 F.2d 1274, 1280-1281 (5th Cir. 1971), cert. den., 404 U.S. 949 (1971).

Table 28, United States Code, Section 1731, provides:

> The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuiness of other handwriting attributed to such person.

Rule 901(a) of the Federal Rules of Evidence provides:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Both Galoni and Cedrone testified that the exemplars had been prepared by them. (213, 234). Galoni stated that he did not know the purpose for which the exemplars were going to be used; Cedrone testified that he was not told the purpose, but assumed that it was for comparison with the

checks at issue. (221, 306). In response to the Court's question, Cedrone stated that prior to preparing the exemplars he had not been shown any of the signatures on the checks at issue.(307). The Court personally examined Cedrone's exemplars (235); it is unclear from the record whether the Court similarly made a personal examination of the Galoni exemplars. (265). Significantly, in his cross-examination of the handwriting expert, whose qualifications he had conceded, defense counsel never asked him whether he could discern from the exemplars attempts at distortion or disguise. Yet an expert is capable of making such an analysis. United States v. Wolfish, 525 F.2d 457, 461 (2nd Cir. 1975).

In light of the foregoing it is submitted that the Court's receipt into evidence of the exemplars was fairly supported by the evidence. The defendant's bare conclusion, with which we do not agree,[6/] that the "motive to falsify was as real in this instance as the motive of a defendant," (Defendant's Brief, at 10), does not satisfy his burden of showing that the ruling was not fairly supported by the evidence.

Significantly, the trial judge instructed the jury that they could give consideration to the handwriting expert's opinion,but that they were not bound by it, and that the issue of the true authorship of the questioned

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6/. For example, if the testimony of Cedrone was "bought and paid for" by the Government, thereby causing him to testify favorably on behalf of the Government and, presumably, to alter his handwriting, why did he so willingly admit that the front of several of the checks that were at issue contained his handwriting? (308-310).

writings was for them to decide. (403, 418-419). In particular, the Court stated:

> [Y]ou should also consider whether under the circumstances either Cedrone or Galoni, or the defendant, had any motive or purpose to falsify or to change their handwriting so as to mislead the handwriting expert, or exculpate themselves or excuse themselves, or escape, perhaps, persecution [sic]. (403).

In addition defense counsel in his summation argued at length the possible motivation of Cedrone and Galoni to falsify the exemplars. (364-365).

POINT II

IT WAS NOT ERROR FOR THE TRIAL COURT TO PERMIT THE WITNESS CEDRONE TO TESTIFY THAT THE DEFENDANT WAS THE RECIPIENT OF RON-ORE CHECKS

On both direct and cross examination the witness Cedrone testified that the defendant, while at the Ron-Ore field office, was given checks drawn on the company's account. (190, 195-198, 280). Earlier a bank teller, Donald Corey, had testified that on a number of occasions he had cashed checks drawn on the Ron-Ore account for the defendant, and had given to the defendant the proceeds. (89-100). Five of these checks were received in evidence based upon this teller's testimony; it was the Government's contention that the proceeds from these checks constituted income to the defendant.

On cross-examination defense counsel diligently attempted to cast doubt upon teller Corey's credibility and powers of recollection. (100-109).

(The importance to the defense of this attack upon Corey is indicated by defense counsel's summation with respect to whether the teller could be believed. (359-360).) In order to corroborate Corey the Government elicited from Cedrone the testimony now under attack.

The defendant argues that this testimony by Cedrone was based on hearsay, rather than personal knowledge, and therefore was in violation of Rule 602 of the Federal Rules of Evidence. This contention simply is inaccurate.

Cedrone's direct testimony was that he personally observed checks being passed to the defendant. (190, 195-198). On cross-examination Cedrone repeated that he had made such personal observations (280); however, in response to defense counsel's questions, Cedrone testified that, in addition to those occasions when he personally observed checks being passed to the defendant, there were other occasions when he did not make such a personal observation, but relied on checkbook entries made by someone else. (280-281). In either event, according to his testimony, Cedrone subsequently made a record of the transaction in a personal notebook. (198, 282).

Cedrone's knowledge with respect to those occasions when he relied on checkbook entries made by someone else concededly was not personal. It was for this reason that the Government did not offer in evidence the notebook. It also was for this reason that the Government did not attempt to prove at trial that these "hearsay" items were part of the defendant's gross income.

In cross-examining Cedrone with respect to the checks he allegedly had observed being given to the defendant, defense counsel voluntarily chose to dwell explicitly and at length on one of the "hearsay" items, a $10,000 check. (281-282). In his direct examination Cedrone had made no reference to such a check, and at no time during the trial did the Government offer any proof with respect to this check.[7/]

Thus since any testimony of a hearsay nature was elicited in response to his counsel's cross-examination the defendant cannot now complain.

POINT III

IT WAS NOT ERROR FOR THE TRIAL COURT TO HAVE PERMITTED CEDRONE TO TESTIFY THAT THE LETTERS "R", "O", AND "N" REPRESENTED CEDRONE AND THE LETTERS "O", "R", AND "E" REPRESENTED PASTORE

Cedrone testified that he had been Project Manager for Ron-Ore Soil Systems, Ltd., and also President of the company. (180). He further stated that in the name "Ron-Ore", the letters "R", "O", and "N" represented Cedrone and the letters "O", "R", and "E" represented Pastore. (181). At trial defense counsel's objection that this testimony was immaterial was over-ruled. (181).

7/. Defense counsel obviously had his own reasons for delving into this hearsay testimony concerning the $10,000 check, since he even discussed it in his summation. (356-357).

On appeal the defendant argues that this testimony was not based upon Cedrone's personal knowledge. If there was any doubt in this respect it was clarified on cross-examination and re-direct examination:

Q. [By defense counsel]. And who suggested that to you?

A. The first time I heard that was from Mr. Pastore.

Q. Was that yesterday when that was suggested to you?

A. No, that wasn't suggested to me yesterday. I heard that the first time from Mr. Pastore. The question was asked yesterday, and I answered the question. (304).

... .

Q. [By the prosecutor]. Now, in connection with the name "Ron-Ore", and yesterday you testified that Ron was Cedrone, and Ore was Pastore, and you testified this morning in response to one of Mr. Palmiere's questions, that on at least one occasion Mr. Pastore told you that that is what the name stood for?

A. Yes, sir.

... .

Q. In any event, I will ask you: Was there an occasion when Mr. Pastore made that statement to you?

... .

THE WITNESS: May I answer that?

BY MR. LOWE:

Q. Yes.

A. The first time I heard that Ron-Ore was from Mr. Pastore. (331-332).

POINT IV

THE GOVERNMENT'S SUMMATION DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL

The defendant concedes in his Brief that in summation the Government could draw inferences, from the evidence adduced at trial, indicating that a corrupt relationship existed between the defendant, Ron-Ore, and Frank and Lenny Cedrone. The defendant further concedes that such inferences were properly drawn and argued to the jury in support of the Government's contention that the check proceeds obtained by the defendant were income to him and therefore should have been reported on his income tax return.

The defendant objects, however, to the prosecutor's use of the phrase "raid on the Town of Fleming" (391) and his statement "The people who suffer, of course, are the people of the Town of Fleming". (392). It is unclear whether the defendant also objects to the prosecutor's reference to the defendant and the Cedrones "lining their pockets" (392) with the sewer project money. In his own summation, of course, defense counsel, in referring to Frank Cedrone, used the phrases "pocketing this money", "you put the money in your pocket by using a pseudonym, a fictitious name", and "pocket that money". (361).

With regard to the statement that "The people who suffer ... are the people of the Town of Fleming," the prosecutor at this point in his summation was pointing out the dual role that the defendant played as both Town Attorney and attorney for Cedrone, president of the company with whom the Town was dealing. In defense counsel's summation the entire

thrust of his attempt to justify the virtually uncontroverted proof showing monies going to the defendant, was to argue that the defendant simply was carrying out the normal and proper duties of a lawyer--but a lawyer for Cedrone. (366, 371). The prosecutor was attempting to demonstrate that in so acting as Cedrone's lawyer the defendant was disregarding the interests of his other clients, the people of the Town of Fleming, and thereby causing them to suffer. And it was this, according to the Government's theory, that constituted the corruption, for which the defendant received money which was income to him. We respectfully submit that this argument was consistent with the prosecutor's right "to marshall all the inferences which the evidence supported". United States v. Mecca, 523 F.2d 68, 73 (2nd Cir. 1975).

With regard to the phrase "raid on the Town of Fleming", the Government concedes that this was not language appropriate to the proper exercise of the prosecutorial function, which is not to win a case, but to see that justice is done. We respectfully submit, however, that such a brief phrase "was not so prejudicial as to seriously affect the integrity of the trial", United States v. Canniff, 521 F.2d 565, 572 (2nd Cir. 1975), particularly since there was ample evidence to justify the conviction. United States v. Benter, 457 F.2d 1174, 1178 (2nd Cir. 1972).

Indeed, the defendant's entire complaint on this point, assuming arguendo that there is some validity to all of it, is directed at nine consecutive sentences stated by the prosecutor during a three day trial, taking up twenty-one lines in

a 429 page trial transcript. A prosecutor's conduct must be examined in the context of the entire trial. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239, 242 (1935). Furthermore, and most significantly, the trial court, immediately following the objected to statements, said to the jury:

> I might say to the jury that the defendant here is not on trial for any charge of corruption or anything of that kind. He is on trial simply and solely for deliberately and willingly and knowingly filing -- on the charge of knowingly and wilfully having filed a false income tax return in which he substantially under-estimated his gross income, and Mr. Lowe, I think that you should focus on that. (392-393).

In addition, in his charge to the jury, the court stated:

> You may find evidence of intent to commit the crime of making a return which was incorrect as to material matters even though there is also some intent or desire to suppress information as to acts which are unrelated to tax returns including other criminal acts, but in that connection, I again caution you and instruct you that the only charge with which this defendant stands on trial here is a charge of filing, knowingly filing a false tax return. (413).

See United States v. Green, 523 F.2d 229, 237 (2nd Cir. 1975).

POINT V

IT WAS NOT ERROR TO GIVE THE SUPPLEMENTAL CHARGE

1. THE ISSUE OF THE PROPRIETY OF THE SUPPLEMENTAL CHARGE WAS NOT PRESERVED BELOW AND SHOULD NOT BE CONSIDERED ON APPEAL.

The defendant at no time made an objection of any nature with respect

to the supplemental charge, nor did he request any additional cautionary language, nor did he request that the jury be permitted to retire for the evening (assuming that such was the jury's desire, although this conclusion certainly does not necessarily follow from the wording of the jury's inquiry to the Court). Rule 30 of the Federal Rules of Criminal Procedure provides, in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

It is submitted that the defendant's failure to object precludes him from asserting this issue on appeal. United States v. Chaplin, 435 F.2d 320, 323 (2nd Cir. 1970); United States v. Martinez, 446 F.2d 118, 120 (2nd Cir. 1971); United States v. Bowles, 428 F.2d 592, 597, ftn. 13 (2nd Cir. 1970). This is particularly true where, as in the instant case, it was not known whether the majority favored conviction or acquittal, and the failure to object could have been intentional:

> Failure to object may have been trial strategy. Had the supplemental charge broken the deadlock in favor or acquittal, such strategy might well have been evidence of astute judgment.

United States v. Hynes, 424 F.2d 754, 758 (2nd Cir. 1970), cert. den., 90 S.Ct. 2270 (1970).

2. THE SUPPLEMENTAL CHARGE AS GIVEN WAS NOT IMPROPER

The defendant initially asserts that the supplemental charge was given sua sponte, without any indication from the jury that they were

deadlocked. Assuming arguendo that this is a correct interpretation of the jury's inquiry, it does not follow that a supplemental charge is unduly coercive when the initiative for it comes from the judge. In fact, such an argument was rejected by this Court in United States v. Martinez, supra, at 119:

> We do not agree that before, rather than after, reaching a deadlock, a jury will be more likely to infer from an "Allen" charge that the judge believes the defendant to be guilty. If anything, it is more probable that the reverse is true. Before deadlock, there is no basis for any juror to feel that the judge is aware of the existence of a "minority" faction in the jury room and is addressing his remarks particularly to them.

Secondly, the defendant objects to the Court's "insistence that the jury continue their deliberation into the early morning hours." There is no basis whatsoever in the record for this allegation.

Finally, the defendant objects to the wording of the supplemental charge as given by the trial court. However, the charge as given was the normal version of the "Allen" charge, i.e., it closely followed the charge described in Allen v. United States, 164 U.S. 492 (1896).[8/] As was stated in United States v. Domenech, 476 F.2d 1229, 1231 (2nd Cir. 1973):

> This court has consistently and recently upheld normal versions of the "Allen" instructions ... and we are of course bound by those rulings.

8/. Prior to giving the "Allen" charge the Court stated that "this is fundamentally a pretty simple case". The Court then reviewed the elements of the alleged crime, and concluded that each element could be answered "either yes or no." It is submitted that there was nothing improper in this respect. More importantly, however, the defendant never objected to this characterization of the issues. As indicated above, such a characterization could have been consistent with the defendant's trial strategy.

Similarly, in United States v. Cowles, 503 F.2d 67, 68 (2nd Cir. 1974), cert. den., 95 S.Ct. 790 (1975), the Court stated:

> The supplemental [Allen] charge was not objected to and has regularly been sustained by this court.

POINT VI

REQUIRING THE DEFENDANT TO RESIGN AS A MEMBER OF THE BAR OF THE STATE OF NEW YORK WAS A PROPER CONDITION OF PROBATION

Title 18, United States Code, Section 3651, provides in part that upon entering a judgment of conviction the court

> when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

As stated in United States v. Nu-Triumph, Inc., 500 F.2d 594, 596 (9th Cir. 1974):

> [J]udicial discretion in probation matters is limited only by the requirement that the terms and conditions thereof bear "a reasonable relationship to the treatment of the accused and the protection of the public".

Similarly, in United States v. Moore, 486 F.2d 1139, 1174 (D.C. Cir. 1973), cert. den., 94 S.Ct. 298 (1973), the Court stated:

> The power to impose [probation] conditions is a broad one, governed by the standard of reasonableness, which permits insulating the individual from the conditions that led him into trouble.

Pursuant to the aforementioned authority other courts have imposed conditions of probation similar to the one in the instant case, and the conditions have not been disturbed on appeal. In Whaley v. United States, 324 F.2d 356, 357 (9th Cir. 1963), where the trial court's probation condition prohibited the defendant from engaging in the repossession business, the Court stated:

> The occupational activity prohibited in the probation condition is the one in which appellant was engaged when he committed the offense of which he stands convicted. The probation condition certainly related to the crime with which he was charged.

See also, Stone v. United States, 153 F.2d 331, 332-333 (9th Cir. 1946) (person convicted of unlawfully taking money from railroad dining cars required not to be employed as a steward on any railroad engaged in interstate commerce during period of probation); People v. Keefer, 35 Cal. App. 3rd 156 (Cal. App. 1973) (defendant convicted of grand theft and false pretenses in connection with furnace and heating business required as condition of probation not to again engage in such business); People v. Bresin, 245 Cal. App. 2d 232 (Cal. App., 1966) (defendant convicted of use of false pretenses in sales of aluminum siding restricted from any occupation involving sales to public); People v. Caruso, 174 Cal. App. 2d 624 (Cal. App., 1959) (defendants, convicted of fraud, forgery and

grand theft in connection with employment by automobile dealership, required to stay out of automobile business, even though they asserted it was the only business they knew). Finally, in United States v. Greenhaus, 85 F.2d 116 (2nd Cir. 1936), a defendant who had been convicted of an illegal sale of securities was placed on probation on condition "that he behave himself well and shall not engage in any shape or form in any stock or bond sale"; this Court noted the probation condition, but did not specifically consider it.

With regard to the defendant's assertion of lack of notice, assuming arguendo that notice was required, §90(4) of the New York State Judiciary Law provided such:

> Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

CONCLUSION

The verdict and judgment of the court below should be affirmed.

Respectfully submitted,
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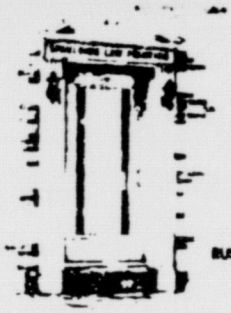

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LETTER OF TRANSMITTAL

Date: March 11, 1976

Hon. A. Daniel Fusaro, Clerk
U. S. Court of Appeals, Second Circuit
Room 1702 U. S. Court House
Foley Square
New York, NY 10007

Re: U. S. A vs. Vito M. Pastore

~~Index No.~~ Docket No. 75-1428

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

[10] ~~Records~~ Appendix

/0 [25] Briefs

[ ] ~~Original Record enclosed~~

[ ] ~~Original Record to come~~

Very truly yours,

Everett J. Rea

Everett J. Rea

AFFILIATED WITH
DAILY RECORD CORP.
ROCHESTER, N. Y.